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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ANGELICA A. et al., Persons Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. RANDY J. et al., Defendants and Appellants.	D053679 (Super. Ct. No. SJ11975 B, C)

APPEALS from orders of the Superior Court of San Diego County, Richard Songer, Referee. Affirmed in part, reversed in part and remanded with directions.

Randy J. and Mary Ann J. (together, the parents) appeal from orders of the juvenile court making jurisdictional and dispositional findings on a juvenile dependency petition filed by the San Diego Health and Human Services Agency (the Agency) on behalf of their minor child, Mark J. (born 2006). They contend the evidence was

insufficient to support the order. Randy also claims the juvenile court erred when it determined that the Indian Child Welfare Act (ICWA) did not apply. Mary Ann appeals from jurisdictional and dispositional findings on a juvenile dependency petition filed by the Agency on behalf of Mark's half-sibling, Angelica A. (born 2001). She also appeals the orders placing Angelica with Angelica's father, Jason, and terminating jurisdiction.

As explained below, we reject the jurisdictional challenges on their merits, but conclude that the dispositional orders removing the children from Mary Ann lacked sufficient evidentiary support. We further conclude that the court and the Agency failed to comply with the notice provisions of ICWA and reverse the jurisdictional and dispositional orders as to Mark for the purpose of ensuring compliance with ICWA notice requirements. We remand these matters to the juvenile court for further proceedings in accordance with the principles expressed in this opinion and with consideration of the children's current circumstances.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2008, the Agency filed dependency petitions on behalf of Mark and Angelica, alleging the children were at substantial risk of sexual abuse by a member of the household after Mary Ann found child pornography on Randy's computer. When Mary Ann confronted Randy, he erased the hard drive and Mary Ann has since minimized the issue, which allegedly placed the children at risk. (Welf. & Inst. Code, § 300, subd. (d), all further statutory references are to this code unless otherwise specified.) The petition as to Angelica also alleged that she was at substantial risk of serious physical harm because Mary Ann left her exposed to Randy. (§ 300, subd. (b).)

The detention report indicated that the pornography Mary Ann saw depicted young children of about Angelica's age and that she had called an aunt about her discovery, but that Randy had deleted the files before the aunt could view them. The aunt confirmed that Mary Ann had called her and was very upset because the photographs involved young children and one girl resembled Angelica. When the aunt arrived, Randy was at the computer deleting files and Mary Ann was crying and told her aunt that she would now need to protect Angelica from Randy.

When a social worker visited the home to investigate, Randy and Mary Ann denied that there was ever child pornography in the home. Mary Ann claimed that she had been mistaken and that the photographs were of teenagers, that they were not illegal and that her aunt was lying. Mary Ann, however, did not know why Randy destroyed his hard drive if he had nothing to hide. Angelica reported that sometimes when Randy put her to bed her pants would come down and that he helped her put them back, but that he did not touch her. When the social worker returned to her office she learned that Randy had tried to commit suicide by cutting his arm with a razor and was taken to the hospital. The Agency detained the children at a confidential foster home.

The following day, another social worker spoke to Mary Ann who again denied seeing any child pornography on Randy's computer. Mary Ann claimed that she had lied to get back at Randy because she believed he was cheating on her, that her aunt had also lied, and that Randy had deleted pirated movies from his computer. Jason told the social worker that Mary Ann was a "chronic liar" and while he wanted to believe that the allegations were not true, he and his current wife wanted custody of Angelica. When the

hospital discharged Randy about a week later, he moved into naval housing and Mary Ann later obtained a temporary restraining order against him.

The Agency filed an addendum report after speaking to J.S. (born 1996), a half-sibling of Mark and Angelica who also lived with Randy and Mary Ann. J. reported that Randy had downloaded photographs of naked children and that Mary Ann had shown him photographs of naked girls on Randy's computer, but that he did not know their ages. J. also reported that Mary Ann had asked him to protect Angelica from Randy.

At the jurisdictional and dispositional hearing, the court found Randy to be Mark's presumed father, entered a judgment of paternity and set the matter for trial. In an addendum report the social worker recommended that Angelica be placed with Jason in Washington state and that jurisdiction be terminated. The social worker also reported that although Mary Ann had begun a sexual abuse program for nonprotecting parents and was seeing a therapist, she continued to insist that she had lied about the pornography. Randy was also participating in therapy and his therapist, Dr. Robert Obrecht, diagnosed him with voyeurism (provisional) and borderline personality disorder and recommended that Randy have only closely supervised visitation with his children.

The Agency then filed an amended petition on Mark's behalf alleging that Randy's mental illness rendered him unable to provide regular care to Mark and that Mary Ann has been unable to protect and supervise Mark. (§ 300, subd. (b).) At the detention hearing on the amended petition, the juvenile court rejected Randy's argument that the amended petition be dismissed based on violation of the psychotherapist-client privilege.

The parties later agreed to proceed by way of trial on the documents and the court accepted all of the Agency's reports into evidence.

The court dismissed the section 300, subdivision (d) allegations regarding substantial risk of sexual abuse, but found true the subdivision (b) allegations regarding substantial risk for physical harm by clear and convincing evidence. As to Angelica, the court entered a judgment of paternity for Jason, gave physical custody of Angelica to Jason in Washington state, granted Mary Ann visitation and terminated jurisdiction. It also declared Mark a dependent child of the court, removed him from his parents' custody under section 361, subdivision (c)(1), placed him with his maternal grandmother and ordered the Agency to provide reunification services. Randy and Mary Ann timely appealed.

DISCUSSION

I. *Standard of Review*

A parent may seek review of both the jurisdictional and dispositional findings on an appeal from the disposition order. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249.) When the sufficiency of the evidence to support a finding or order is challenged on appeal, the reviewing court must determine if there is any substantial evidence, that is, evidence which is reasonable, credible, and of solid value to support the conclusion of the trier of fact. (*In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.) In making this determination, all conflicts are to be resolved in favor of the prevailing party and issues of fact and credibility are questions for the trier of fact. (*In re Steve W.* (1990) 217 Cal.App.3d 10, 16.)

"However, substantial evidence is not synonymous with any evidence. [Citations.] A decision supported by a mere scintilla of evidence need not be affirmed on appeal. [Citation.] Furthermore, '[w]hile substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations].' [Citation.] 'The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.' [Citation.]" (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393-1394 (*Savannah M.*), italics omitted.)

II. *Jurisdictional Order*

A. Legal Principles

Dependency jurisdiction is taken over the child, not the parent, when the child needs to be protected. (§ 300; see *In re Alysha S.* (1996) 51 Cal.App.4th 393, 397.) In a dependency proceeding, the Agency must prove by a preponderance of the evidence that the child who is the subject of the petition comes under the court's jurisdiction. (§ 355.) Section 300, subdivision (b) provides that jurisdiction may be assumed if:

> "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, . . . or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse. . . ."

Under this section the Agency must show: "(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) 'serious physical harm or illness' to the minor,

or a 'substantial risk' of such harm or illness." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820 (*Rocco M*).) The third element requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future. (*Savannah M.*, *supra*, 131 Cal.App.4th at p. 1396.) Standing alone, past conduct is insufficient to establish a substantial risk of harm and "there must be some reason beyond mere speculation to believe [the past conduct] will reoccur. [Citations.]" (*In re Ricardo L.* (2003) 109 Cal.App.4th 552, 564-565.)

B. Analysis

The parents contend that the juvenile court's jurisdictional finding under section 300, subdivision (b) was not supported by substantial evidence because the record does not show how Randy's mental problems created a substantial risk of serious physical harm or illness to the children or that Mary Ann's inability to protect and supervise the children created a substantial risk of serious physical harm or illness.

The Agency does not argue that the children suffered any physical harm or illness due to Randy's mental illness or Mary Ann's inadequate supervision and the record contains no evidence to support such a finding. Accordingly, we focus on whether the record contains substantial evidence showing a substantial risk of serious physical harm in the future. Such risk of harm cannot be presumed from the mere fact of the parent's mental illness (*Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1079); rather, a parent's mental illness can provide the basis for jurisdiction where the Agency has shown that the parent's behavior adversely affects the child's safety or well-being. (*Ibid*.)

The only evidence of Randy's mental illnesses is the hospital records and an email communication from Dr. Obrecht to a social worker. Dr. Obrecht reported that Randy has been forthright in accepting responsibility for his recent behavior and based on his "high level of meaningful involvement" and assuming Randy's continued sincere participation, Dr. Obrecht expected a positive outcome. Nonetheless, Dr. Obrecht recommended that Randy's interactions with his children be "closely supervised." Although Dr. Obrecht provided no explanation for this recommendation, the court could reasonable infer that Randy's psychological issues were not under control and that the children's safety was at risk.

Notably, Randy attempted suicide in response to the current crisis involving the children, admitted "cutting" himself a few times in the past couple of years to "get at" Mary Ann and previously attempted suicide when he was 15-years old. While these incidents were not described in great detail, they are sufficient to show a pattern of behavior. The juvenile court could reasonably infer that the children were at substantial risk of serious physical harm should Randy engage in such behavior when Mary Ann was not home to supervise the children because they are too young to be expected to care for themselves.

For therapy purposes, Dr. Obrecht provisionally diagnosed Randy with voyeurism, noting that Randy's behavior was below the clinical threshold for this illness because the behavior occurred over a period of less than six months and based on Randy's reports, did not involve "intense sexually arousing fantasies or masturbatory behavior." However, Randy's downloading of pornographic images of a child resembling Angelica is extremely

disturbing and there is no way of knowing whether this was an isolated incident because Randy destroyed his computer hard drive effectively eliminating any evidence showing how often he downloaded such images. Given this conduct, the court could justifiably doubt the veracity of Randy's self-reports that his viewing of the child pornography did not involve sexually arousing fantasies or masturbatory behavior.

Equally disturbing were Angelica's reports that on multiple occasions her pants and underwear came completely off when Randy put her to sleep and this would occur when Mary Ann was at the store. Although the juvenile court dismissed the section 300, subdivision (d) allegation that Angelica was at risk for sexual abuse, any sexual abuse endangered Angelica's physical health and safety. The court could also reasonably infer that Mary Ann's inability to understand why the children were removed could result in her leaving Angelica exposed to Randy.

We acknowledge that the record suggests the children would not have contact with Randy because he had moved into naval housing and Mary Ann had obtained a restraining order against him; however, Randy's living situation could change should Mary Ann seek to vacate the restraining order. The record here was wholly underdeveloped and we cannot fault the court for taking a cautious approach as to the children. Given the deference we must accord a juvenile court's factual findings, we conclude the evidence and reasonable inferences therefrom supported the juvenile court's jurisdictional orders.

III. *Dispositional Order*

A. Legal Principles

A juvenile court has broad discretion to fashion a dispositional order that best serves and protects a child's interest. (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1006; §§ 245.5, 361, subd. (a), 362.) However, a parent's right to the care, custody and management of a child is a fundamental liberty interest protected by the federal constitution. (*Santosky v. Kramer* (1982) 455 U.S. 745, 753.) Thus, to justify removal of the child the juvenile court must have clear and convincing evidence (1) that there is a substantial danger to the child's physical well-being and (2) that there is no reasonable way to protect the child in the parent's home. (§ 361, subd. (c)(1).) On review, we again utilize the substantial evidence test, bearing in mind the heightened burden of proof. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.)

Less drastic alternatives to removal may be available in a given case including returning a minor to parental custody under stringent conditions of supervision by the Agency such as unannounced visits. (*In re Henry V.* (2004) 119 Cal.App.4th 522, 529.) Another possible alternative is an order excluding the offending parent from the home. (Cal. Rules of Court, rule 5.630.) Removal "is a last resort, to be considered only when the child would be in danger if allowed to reside with the parent." (*In re Henry V.*, *supra*, at p. 525.) "Because we so abhor the involuntary separation of parent and child, the state may disturb an existing parent-child relationship only for strong reasons and subject to careful procedures." (*Id.* at pp. 530-531.)

When a court orders a child removed from a custodial parent's home, the court shall first determine whether the noncustodial parent desires custody of the child. When the noncustodial parent requests custody, the court must place the child with that parent unless it finds that such placement would be detrimental to the child. (§ 361.2, subd. (a).) When the trial court proceeds under section 361.2, subdivision (a), it is required to make a finding of detriment "in writing or on the record of the basis for its determination[.]" (§ 361.2, subd. (c); *In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1824.)

After placing the child in the custody of the noncustodial parent, the court has the option of (1) terminating jurisdiction, (2) retaining jurisdiction and ordering services for the parent from whom the child is being removed, (3) retaining jurisdiction and ordering services solely for the parent who is now assuming custody, or (4) retaining jurisdiction and ordering services for both parents with a later determination of which parent, if any, will be awarded permanent custody. (§ 361.2, subd. (b)(1), (2).) When the child is placed with the noncustodial parent, "the court may not terminate jurisdiction until it analyzes whether ongoing supervision of the child is necessary." (*In re Austin P.* (2004) 118 Cal.App.4th 1124, 1128-1129.) A need for continuing supervision may exist where the child has had only sporadic contact with the noncustodial parent. (*Id.* at p. 1134.)

B. Analysis

Randy and Mary Ann contend there was insufficient evidence to support the juvenile court's dispositional order removing the children from Mary Ann's custody because there were less drastic alternatives available. Mary Ann also contends that the juvenile court erred when it placed Angelica with Jason without considering detriment to Angelica and

terminated its jurisdiction over Angelica without addressing whether ongoing supervision was necessary. We agree there was insufficient evidence to support the juvenile court's dispositional order removing the children from Mary Ann's custody.

For purposes of appeal, we will assume that the evidence was sufficient to support the juvenile court's implied finding that the evidence satisfied the initial statutory requirement of "a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor" in the event of a return home. (§ 361, subd. (c)(1).) The critical issue becomes whether the evidence was sufficient to justify the court's implied finding that there was no reasonable way to protect the children in the parent's home. (*Ibid*.)

As a threshold matter, we note that "[r]emoval on any ground not involving parental rejection, abandonment, or institutionalization requires a finding that there are no reasonable means of protecting the child without depriving the parent of custody." (*In re Henry*, *supra*, 119 Cal.App.4th at p. 525; § 361, subd. (c).) Here, there was no discussion at the hearing of alternatives to out-of-home placement. Although the juvenile court's orders concluded there was no reasonable means to protect the children without removing them, the court did not state the factual basis for this finding and the record does not support it.

Mary Ann lied about the pornography to protect Randy and exhibited poor judgment by showing the pornography to J., however, the Agency fails to explain how these facts justified removing the children from her care. Mary Ann immediately acted in the best interests of her children by attending a sexual treatment group for non-protecting

parents and obtaining a restraining order against Randy. Mary Ann informed the social worker that her children came before her marriage and the social worker noted that the parents were willing to do whatever it took to reunify with their children and commended their efforts in immediately seeking services.

There is nothing in the record showing Mary Ann failed to attend her sex abuse program for nonprotecting parents and there were no reports from Mary Ann's therapist regarding her progress or lack of progress. Additionally, Dr. Obrecht noted that Randy's mental status has been normal since his discharge from the hospital and that Randy attended his weekly appointments and "participated in a meaningful and forthright manner, and continues to be future focused in terms of re-establishing healthy relationships with his wife and children."

While the court may have been legitimately concerned that Randy was just beginning to address his psychological issues and that Mary Ann minimized the significance of Randy's conduct, these concerns do not demonstrate a high probability that the children would be at risk if they were returned to Mary Ann under the supervision of the Agency. (*In re Terry D.* (1978) 83 Cal.App.3d 890, 899 [a preponderance calls for probability, while clear and convincing proof demands a high probability].) Randy's conduct precipitated the petitions and this case does not present a situation where Mary Ann neglected, rejected or abandoned the children. The record shows that the parents have done everything required of them and there is nothing to suggest they would not follow a juvenile court order requiring that Randy stay out of the home and have no contact with the children absent supervision by someone other than

Mary Ann. Additionally, the court could order unannounced in-home visits to ensure compliance with its orders.

In summary, notwithstanding the sufficiency of the evidence to support the jurisdictional orders, the evidence was insufficient to meet the heightened burden of proof to justify removal of the children from Mary Ann's care and custody.

Our reversal of the dispositional orders removing the children from Mary Ann's care moots the juvenile court's subsequent orders placing Angelica with Jason and terminating jurisdiction over her. Nonetheless, the juvenile court could again decide it is in Angelica's best interests to remove her from Mary Ann's care and custody. Accordingly, on remand, the juvenile court is directed to consider whether placement with Jason would be detrimental to Angelica. (§ 361.2, subd. (c).) Should the court again decide it is in Angelica's best interests to place her with Jason, it is directed to analyze whether there is a need for continuing supervision. (*In re Austin P.*, *supra*, 118 Cal.App.4th at pp. 1128-1129.) Naturally, the juvenile court must render its decision based upon all relevant information before it, including information arising after the date of the prior dispositional hearing.

IV. *ICWA*

A. Facts

Randy reported on his ICWA-020 form that he might have Indian ancestry with the Blackfoot and Chickasaw tribes and the court deferred any ICWA findings at the detention hearing. The court again deferred any ICWA finding as to Mark after Randy testified that no one in his family lived on a reservation, received tribal benefits,

participated in tribal elections or spoke any Indian languages. Randy also testified that no one in his immediate family had a certificate of Indian blood and that his mother had researched the issue but could not prove her heritage because all records were burned in a fire during the 1950's. At a later settlement conference, the court stated that it previously found that ICWA did not apply.

At another settlement conference the court again stated that it previously found ICWA did not apply and asked the parties to provide information if that finding was made in error. Hearing no objections, the court confirmed its prior finding that ICWA did not apply. A few moments later, however, counsel for the agency stated that his notes showed that the court had deferred the ICWA finding and he did not know whether the court had made a finding, to which the court replied: "I don't think it has."

B. Analysis

Randy argues the juvenile court erred in finding that ICWA did not apply. We agree.

If a court "knows or has reason to know that an Indian child is involved" in a juvenile dependency proceeding, a duty arises under ICWA to give the Indian child's tribe notice of the pending proceedings and its right to intervene or obtain jurisdiction over the proceedings by transfer to the tribal court. (25 U.S.C. § 1912(a); *In re Aaliyah G.* (2003) 109 Cal.App.4th 939, 941.) Notice must be sent whenever there is reason to believe the child may be an Indian child; only a suggestion of Indian ancestry is needed to trigger the notice requirement. (*In re Robert A.* (2007) 147 Cal.App.4th 982, 989.)

Because failure to give proper notice of a dependency proceeding to a tribe with which the dependent child may be affiliated forecloses participation by the tribe, ICWA notice requirements are strictly construed. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 174.) The notice requirements are mandatory and cannot be waived by the parties. (*In re Jennifer A.* (2002) 103 Cal.App.4th 692, 707.) The failure to provide proper notice is prejudicial error requiring reversal and remand. (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.)

First, it is arguable whether the court even decided whether ICWA applied to Mark. Assuming it did, the evidence before the court revealed that Randy may have Indian heritage through the Blackfoot and Chickasaw tribes. This suggestion that Mark may have Indian heritage required that notice be given. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 258.) Accordingly, we will remand the case with directions to the juvenile court to assure that the required notices are properly given and, based on the results, determine whether Mark is an Indian child under ICWA.

DISPOSITION

The jurisdictional order declaring Angelica a dependent of the juvenile court is affirmed. The dispositional order removing custody of Angelica from Mary Ann pursuant to section 361, subdivision (c)(1) is reversed. The juvenile court is directed to conduct another dispositional hearing in accordance with the principles expressed in this opinion and with consideration of Angelica's current circumstances.

The jurisdictional and dispositional orders as to Mark are reversed. The matter is remanded to the juvenile court with directions to order the Agency to comply with ICWA

notice provisions. If an Indian tribe determines Mark is an Indian child under ICWA, the court shall conduct the jurisdictional, dispositional and all subsequent hearings in accordance with ICWA. If, after proper notice, no tribe claims that Mark is an Indian child: (1) the jurisdictional order shall be reinstated and (2) the dispositional order removing custody of Mark from Mary Ann pursuant to section 361, subdivision (c)(1) shall be reversed and the juvenile court directed to conduct another dispositional hearing in accordance with the principles expressed in this opinion and with consideration of Mark's current circumstances.

McINTYRE, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.